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No. 84-539

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

MOL, INC., Petitioner,

v.

THE PEOPLE'S REPUBLIC OF
BANGLADESH, Defendant.

BRIEF OF AMICUS CURIAE, ATTORNEYS FOR ANIMAL RIGHTS, IN OPPOSITION TO PETITION FOR CERTIORARI

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Amicus, Attorneys for Animal Rights (AFAR), respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking a review of the decision of the United States Court of Appeals for the Ninth Circuit (reported at 736 F.2d 1326 (1984)), reproduced as Appendix A to the petition.

INTEREST OF AMICUS

Amicus, Attorneys for Animal Rights, is an unincorporated charitable and tax-exempt professional association with a nationwide membership of law students and attorneys. It maintains its principal office in San Francisco, California.

Amicus has, as a primary purpose, the protection of all animals, particularly endangered and threatened species. Amicus has a strong interest in insuring that proper legal procedures are followed in all

cases where the welfare of such animals may be at issue. Amicus has commenced litigation and otherwise intervened in court actions when necessary to protect animals.

Attorneys for Animal Rights participated in this proceeding as an amicus curiae in both the District Court (App-40) and the Court of Appeals. By letter dated October 23, 1984, a copy of which will be supplied to the Clerk of this Court, petitioner, through its attorney, has stated it has no objection to the filing in this Court of an amicus curiae brief.

QUESTION PRESENTED

When a foreign state, pursuant to its sovereign power to regulate its indigenous wildlife, enters into an exclusive export license and later revokes

it, is that foreign state immune from suit arising out of such revocation, under the Foreign Sovereign Immunities Act ("FSIA," 28 U.S.C. section 1601 et seq.)?

STATEMENT OF THE CASE

In March of 1977, the People's Republic of Bangladesh granted an exclusive license to MOL Enterprises, Inc., an Oregon corporation, for the export of macaca mulatta (rhesus) monkeys. Under the terms of the license, the exported primates were to be used exclusively for the purposes of medical and other scientific research for the general benefit of all peoples of the world. App-2.[1/] In order to protect

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1/ Rhesus monkeys are valuable animals for the conduct of scientific and medical research; see Opinion of the district court at App-12.

the existing wild population from depletion due to overtrapping and to establish a stable population of rhesus monkeys, the licensee had a duty to establish in Bangladesh a facility for the captive breeding of rhesus monkeys. The license also imposed limitations on the number of monkeys that could be taken from the wild for export purposes, imposed a duty to conduct population surveys of wild monkeys, and required that the license agreement be implemented without endangering the wildlife populations and environment of Bangladesh.

The government of Bangladesh expressly reserved its right to terminate the license in case of any non-performance of its requirements. App-15. On January 3, 1979, Bangladesh exercised that reserved power of termination and revoked MOL's

export license. The termination notice recited that MOL had failed to fulfill its obligations under the license because it had not constructed a breeding farm and because it sold monkeys to the Armed Forces Radiobiologic Research Institute for neutron bomb radiation experiments. App-48.

In 1982, MOL filed suit in the United States District Court for the District of Oregon, claiming that Bangladesh had breached its "contract" with MOL, and seeking $15,000,000 in damages. The Peoples' Republic of Bangladesh made no appearance. The District Court denied MOL's motion for a default judgment and, on its own motion, dismissed the lawsuit. The court held that it had no jurisdiction over Bangladesh under the Foreign Sovereign Immunities Act, 28 U.S.C. section 1601 et seq., and alternatively, that the act of

state doctrine precluded the court's adjudication of the dispute. 572 F. Supp. 79 (D. Oregon 1983).

On appeal, the Court of Appeals affirmed on the statutory ground, holding that Bangladesh was immune from suit under the FSIA because the "revocation [of the license] was sovereign in nature, not commercial." App-10.

REASONS WHY THE WRIT SHOULD BE DENIED

The Petitioner fails to meet the requirements for the exercise of certiorari jurisdiction. Supreme Court Rule 17 provides that certiorari shall be granted only "when there are special and important reasons therefor." These reasons include:

> When a federal court of appeals has rendered a decision in conflict with a decision of another federal court of appeals on the same matter . . . or has so far departed from the accepted

> and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision.

The Petition does not set forth any conflict among the courts of appeals regarding the scope of FSIA immunity. Petitioner merely recites "recent cases" that "struggle" with the commercial activity exception to sovereign immunity of foreign states (Pet. at 10-11). Petitioner cites no cases that involve any conflict whatsoever between circuits as to the commercial activity exception to sovereign immunity, 28 U.S.C. section 1605(a)(2).

Moreover, the Court of Appeals opinion does not depart from accepted and usual judicial proceedings. The Court of Appeals held that, ". . . because the granting and revocation of a license to export a natural resource are sovereign

acts, we have no jurisdiction over this claim." App-1. Petitioner's argument that the Court of Appeals opinion extends a "blanket immunity" to foreign sovereigns for any act or decision involving natural resources is disingenuous in light of the concessions it made before the court. There, petitioner admitted that licensing the exploitation of natural resources is a sovereign activity. App-7. Therefore the court had only to decide whether the revocation of such a license likewise constituted a sovereign act. Id.

Given the petitioner's litigation posture, the Court of Appeals had no reason to distinguish the sovereign acts of granting or revoking a license with respect to a scarce natural resource from commercial activity engaged in by a sovereign that would subject it to federal

court jurisdiction under the FSIA.[2/] Contrary to petitioner's contentions, the Court of Appeals by no means extends a "blanket immunity" to foreign sovereigns for any act or decision involving natural resources, since petitioner itself conceded that the issuance of the license for the export of wild primates constituted a sovereign act.

Petitioner makes the same concessions before this Court that it made in the Court of Appeals. It admits that the "Ninth Circuit here held that the

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2/ Other circuit courts, however, have had little difficulty distinguishing "commercial activity" carried on by sovereigns from noncommercial activity protected under the FSIA. See, e.g., Texas Trading & Milling Corp. v. Fed. Republic of Nigeria 647 F.2d 300 (2d Cir. 1981); Jackson v. People's Republic of China, 550 F. Supp. 869 (N.D. Ala. 1982); and Wyle v. Bank Melli of Tehran, Iran, 577 F. Supp. 1148 (N.D. Cal. 1983).

granting of a license or contract to exploit natural resources is not a 'commercial activity' within the meaning of the FSIA, a proposition with which petitioners do not quarrel." Pet. at 11; emphasis added. Later, petitioner repeats that Bangladesh "may have decided in its sovereign capacity that the agreement should contain certain terms. Those decisions are not challenged here. . . ." Pet. at 22.

Petitioner thus presents to this Court the same argument it presented to the Court of Appeals: that, because Bangladesh chose to revoke the license by exercising a power specifically reserved in the license agreement, rather than by decree, executive order or other "governmental act," Bangladesh therefore engaged in a commercial

act subject to FSIA jurisdiction. The Court of Appeals correctly rejected this argument, refusing to define so narrowly the "act" in question. The court looked not only at the termination of the license agreement, but also at the nature of the activity involved -- the sovereign's regulation of its indigenous wildlife.[3/]

The reasons given by Bangladesh for the revocation -- the failure of the licensee to establish a captive breeding farm to sustain the population of rhesus monkeys and its use of rhesus monkeys in

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3/ The FSIA specifically requires an evaluation of the "nature of the course of conduct" rather than its purpose, in evaluating whether immunity applies. 28 U.S.C. section 1603(d).

neutron bomb radiation experiments -- clearly implicated its sovereign powers over natural resources and foreign relations. The licensing agreement expressly reserved the power of revocation to Bangladesh. When it revoked the licensing agreement, it was exercising sovereign powers reserved under the terms of the licensing agreement to protect its wildlife.[4/]

As the Court of Appeals noted, a "change in format" in the mode of exercise of any sovereign power does not change its

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4/ Control and regulation of wildlife is generally considered to be a sovereign function. Domestic law in the United States concerning the protection, use, and exploitation of natural resources, including wildlife, recognizes these as sovereign functions. See Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 386, 392 (1978), and Hughes v. State of Oklahoma, 441 U.S. 322 (1979).

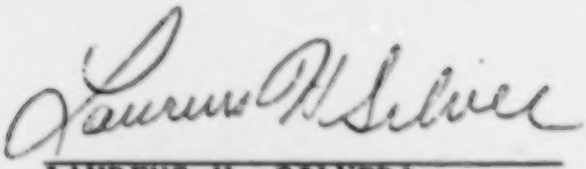
essential nature. See IAM v. OPEC, 477 F. Supp. 553, 568 n. 14 (C.D. Cal. 1979), affirmed on other grounds, 649 F.2d 1354 (9th Cir.), cert. denied, 454 U.S. 1163 (1981). When a sovereign exercises its power over wild animals by issuing an export license, and gives express notice to the licensee that a power of termination was being reserved, the revocation of the earlier sovereign act must itself be a sovereign act. If, as petitioner concedes, there is immunity under FSIA with respect to the issuance of the export license involving wild indigenous animals, there must be immunity under the FSIA with respect to the revocation of that license. The Court of Appeals properly rejected petitioner's arguments that Bangladesh engaged in a "commercial act" when it cancelled the licensing agreement.

CONCLUSION

The Petition for Certiorari should be denied. Petitioner's arguments for granting the Writ fail to meet this Court's own standards, as set forth in Rule 17. There is no conflict among the Courts of Appeals, nor does the Court of Appeals opinion in this case depart in any way from accepted judicial proceedings. The Court of Appeals correctly determined that the District Court did not have jurisdiction over the government of Bangladesh with respect to its sovereign acts regulating

its indigenous wildlife by cancellation of an export license.[5/]

Respectfully submitted,



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October 31, 1984

5/ The Court of Appeals decision does not conflict with any applicable decision of this Court. Rule 17(1)(c). Moreover, the act of state doctrine is an appropriate alternative ground for dismissal of this lawsuit, as held by the District Court. See App. at 33-39.